WONG TECK LIM

v.

SIM LIM FINANCE LTD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-03-25-1997]
22 MARCH 2001

CIVIL PROCEDURE: *Affidavits - Contents - Statement of fact made within personal knowledge of another - Whether deponent must reveal how that fact came to his knowledge*

CIVIL PROCEDURE: *Reciprocal enforcement of judgments - Setting aside registration of Singapore judgment - Whether service by way of substituted service proper - Whether jurisdiction of Singapore court applicable - Whether loan transaction that gave rise to commencement of action valid - Whether consent of Controller of Foreign Exchange Malaysia obtained - Supreme Court of Judicature Act 1969 (Singapore), s. 16(1)(b); Exchange Control Act 1953, s. 36*

The application by the appellant herein to set aside the registration of the Singapore judgment obtained by the respondent herein against him was dismissed by the senior assistant registrar. The appellant's appeal to the High Court was also dismissed. Hence, the present appeal.

The issues were: (1) whether the affidavit in support of the application that was affirmed by the appellant's son on his behalf was acceptable; (2) whether there was service to the appellant; (3) whether the appellant submitted to the jurisdiction of the Singapore court; (4) whether the High Court of Singapore had jurisdiction on the appellant in view of s. 16(1)(b) of the Supreme Court of Judicature Act 1969 ('the Singapore Act'); and (5) whether the loan transaction which gave rise to the respondent's action against the appellant as guarantor, was valid as the consent of the Controller of Foreign Exchange Malaysia was not obtained.

Held:
Per Mokhtar Sidin JCA

[1] A person can file an affidavit as long as the statements therein are within his knowledge. It would be wrong if he swore an affidavit in respect of anything within the personal knowledge of another person unless he

revealed how that fact came to his knowledge. As such, the statement in para. 2 of the affidavit in support that there was no due service to the appellant could not be accepted because it was based on the belief of the deponent, *ie*, the appellant's son, and he did not reveal how he came to know of that fact.

[2] The respondent had revealed that personal service could not be effected on the appellant and that led to the substituted service by way of advertisement in the Malaysian newspaper. Further, from the affidavits and exhibits attached thereon, it was clear that the appellant was duly served with the concurrent writ of summons by way of substituted service.

[3] Clause 20 of the guarantee in which the appellant guaranteed the repayment of the loan taken with the respondent stipulated that the laws of Singapore apply therein. Therefore, when the appellant signed the guarantee with full knowledge of cl. 20, he had submitted to the jurisdiction of the High Court of the Republic of Singapore.

[4] Since the amendment to the Singapore Act took place after the present action had been instituted, the amendment would not affect the present appeal. The former s. 16(1)(b) of the Singapore Act applied to the present appeal. Therefore, the respondent was entitled to include and sue the appellant as one of the defendants in the action commenced as the appellant was one of the guarantors to the loan.

[5] From the affidavit, it was apparent that the appellant was a citizen and resident of the United States of America. That being the case there was a good possibility that when the advertisement of the concurrent writ appeared, the appellant was not in Malaysia. The appellant must satisfy the court by evidence that he did not see the advertisement and give good reasons why he did not see it. The appellant lost that opportunity to challenge the judgment in the original court.

[6] Borrowing does not make the act illegal by virtue of s. 36 of the Exchange Control Act 1953. The Act does not provide a moratorium for debtors but controls the immediate destination of the payments made by them. Moneys due under a judgment can be paid into court, thus discharging the debtor and the fund itself remains out of the control of the creditor until consent of the Controller of Foreign Exchange Malaysia has been obtained.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Permohonan oleh perayu di sini untuk mengenepikan pendaftaran penghakiman Singapura yang didapati oleh responden di sini terhadap beliau telah ditolak oleh penolong kanan pendaftar. Rayuan perayu kepada Mahkamah Tinggi telah juga ditolak. Maka, rayuan ini.

Isu-isunya adalah: (1) samada afidavit yang menyokong permohonan tersebut yang diikrarkan oleh anak perayu bagi pihak beliau boleh diterima; (2) samada terdapatnya penyampaian kepada perayu; (3) samada perayu menyerah kepada bidangkuasa mahkamah Singapura; (4) samada Mahkamah Tinggi Singapura mempunyai bidangkuasa ke atas perayu memandangkan s. 16(1)(b) Akta Kehakiman Mahkamah Agong 1969 ('Akta Singapura'); dan (5) samada transaksi pinjaman yang membawa kepada tindakan responden terhadap perayu sebagai penggerenti adalah sah kerana kebenaran dari *Controller of Foreign Exchange Malaysia* tidak diperolehi.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Seseorang boleh memfailkan sesuatu afidavit asalkan pernyataan-pernyataan di dalamnya adalah di dalam pengetahuannya. Ianya adalah salah jika orang tersebut mengikrarkan sesuatu afidavit berhubung dengan mana-mana fakta dalam pengetahuan peribadi seseorang yang lain kecuali jika ia mendedahkan bagaimana fakta itu diketahuinya. Oleh yang demikian, pernyataan dalam perenggan 2 afidavit sokongan bahawa tiada penyampaian yang dilaksanakan kepada perayu tidak boleh diterima kerana ianya adalah berdasarkan kepercayaan deponen, iaitu anak perayu, dan beliau tidak mendedahkan bagaimana fakta tersebut diketahuinya.

[2] Responden telah mendedahkan bahawa penyampaian ke diri tidak dapat dikuatkuasakan ke atas perayu dan itu telah membawa kepada penyampaian ganti melalui iklan di dalam akhbar Malaysia. Daripada afidavit-afidavit dan ekshibit-ekshibit yang dilampirkan, ianya jelas bahawa perayu telah pun disampaikan dengan writ saman serentak melalui penyampaian ganti.

[3] Fasal 20 gerenti di mana perayu telah menggerentikan pembayaran balik pinjaman yang diambilnya daripada responden menentukan bahawa undang-undang Singapura terpakai. Oleh itu, apabila perayu menandatangani gerenti tersebut dengan penuh pengetahuan mengenai fasal 20, beliau telah menyerah kepada bidangkuasa Mahkamah Tinggi Republik Singapura.

[4] Oleh kerana pindaan kepada Akta Singapura berlaku selepas tindakan ini dimulakan, pindaan tersebut tidak akan menjejaskan rayuan kini. Seksyen 16(1)(b) Akta Singapura yang terdahulu itu terpakai pada rayuan kini. Oleh itu, responden berhak untuk memasukkan dan mendakwa perayu sebagai salah seorang defendan-defendan dalam tindakan yang dimulakan kerana perayu adalah salah seorang penggerenti kepada pinjaman tersebut.

[5] Daripada afidavit tersebut, ianya jelas bahawa perayu adalah seorang warganegara dan pemastautin Amerika Syarikat. Dalam keadaan itu, besar kemungkinan bahawa ketika iklan writ serentak itu disiarkan, perayu tidak berada di Malaysia. Perayu mestilah menyakinkan mahkamah melalui keterangan bahawa beliau tidak melihat iklan tersebut dan memberikan alasan mengapa beliau tidak melihatnya. Perayu kehilangan peluang itu untuk mencabar penghakiman dimahkamah pertama tersebut.

[6] Meminjam tidak salah di sisi undang-undang menurut s. 36 Akta Pertukaran Asing 1953. Akta tersebut tidak memberikan satu moratoriam untuk penghutang-penghutang tetapi mengawal destinasi pembayaran-pembayaran mereka. Wang yang kena dibayar di bawah penghakiman boleh dibayar ke dalam mahkamah, dan itu melepaskan penghutang daripada hutangnya. Dana itu sendiri kekal di luar kawalan pemiutang sehingga kebenaran oleh *Controller of Foreign Exchange Malaysia* telah diperolehi.

[Rayuan ditolak.]

Case(s) referred to:

Bank of New Zealand v. Wong Kee Tat [1990] 1 CLJ 1130 ***(foll)***

Blohn v. Desser [1961] 3 All ER 1 ***(refd)***

Malayan Banking Bhd v. International Tin Council & Another Appeal [1989] 2 CLJ 961 ***(foll)***

United Malayan Banking Corporation Bhd v. Soo Lean Tooi & Ors [1984] 1 MLJ 47 ***(foll)***

United Overseas Bank Ltd v. Tjong Tjui Njuk [1987] 2 MLJ 295 ***(dist)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(b)

Exchange Control Act 1953, s. 36

Reciprocal Enforcement of Judgments Act 1958, ss. 4, 5(1)(a), (iii), (2)(a)(i)

Supreme Court of Judicature Act 1969 [Sing], s. 16(1)(b)

For the appellant - MS Murthi; M/s Murthi & Partners

For the respondent - Maniam Kuppusamy; M/s Skrine & Co

Reported by Usha Thiagarajah

JUDGMENT

Mokhtar Sidin JCA:

We have dismissed this appeal earlier and we now give our reasons for doing so.

In the present appeal, the respondent had, on 22 August 1988, entered judgment against the appellant in the High Court of the Republic of Singapore. On 11 April 1989 the respondent proceeded to register the judgment in the High Court of Malaya at Kuala Lumpur under the Reciprocal Enforcement of Judgments Act 1958. The judgment obtained in the High Court of the Republic of Singapore was worded as follows:

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

Suit No.)
43 of 1988)

Between

SIM LIM FINANCE LTD
... Plaintiffs

And

1. PHELIM INVESTMENTS PTE LTD
2. DATOK WONG KEE TAT
3. WONG TECK LIM
... Defendants

JUDGMENT

THE 22ND DAY OF AUGUST 1988

No Appearance having been entered by the 3rd Defendant herein.

IT IS THIS DAY ADJUDGED that the 3rd Defendant do pay the plaintiffs

(i) the sum of S$1,532,987.86;

(ii) interest at the rate of 18% per annum from 29th October 1987 till the 22nd August 1988 amounting to S$226,042.21; and

(iii) S$1,071.00.

Dated the 22nd day of August 1988.

Sgd.
ASSISTANT REGISTRAR

Entered this 22nd day of August 1988.

Volume 403 page 112 at 3.10 p.m.

On 11 April 1989 the senior assistant registrar in the High Court of Malaya at Kuala Lumpur issued the following order:

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(CIVIL APPEALS & MISCELLANEOUS APPLICATION)
ORIGINATING SUMMONS NO. R8-24-31-89

In the Matter of Reciprocal Enforcement of Judgments Act, 1958

And

In the Matter of a Judgment of the High Court of the Republic of Singapore obtained in Suit No. 43 of 1988 and dated the 22nd August 1988.

Between

SIM LIM FINANCE LTD ... Plaintiffs

And

1. PHELIM INVESTMENTS PTE LTD
2. DATOK WONG KEE TAT
3. WONG TECK LIM ... Defendants

Between

SIM LIM FINANCE LTD ... Plaintiffs

And

WONG TECK LIM ... Defendant

BEFORE THE SENIOR ASSISTANT REGISTRAR,
ENCIK AHMAD ZAIDI IBRAHIM
THIS 11TH DAY OF APPIL, 1989 IN CHAMBERS

ORDER

UPON the application of Sim Lim Finance Ltd, the Plaintiffs abovenamed AND UPON READING the Ex-parte Originating Summons dated the 17th day of March, 1989 and the Affidavit of Teh Choo Thok affirmed on the 21st day of February, 1989 both filed herein AND UPON HEARING Miss Yee Chooi Mee @ Josephine Yee Chooi Mee of Counsel for the Plaintiffs abovenamed **IT IS ORDERED** that the Judgment dated the 22nd day of August 1988 of the High Court of the Republic of Singapore, whereby it was adjudged that the abovenamed Wong Teck Lim, the Defendant abovenamed do pay Sim Lim Finance Ltd, the Plaintiffs abovenamed:

(1) The sum of Ringgit $2,055,260.95 (equivalent to S$1,598,181.14 at the exchange rate of S$100.00 to Ringgit $128.60 as at 22-8-88);

(2) Further interest of 8% per annum is payable on the Judgment debt from 22-8-88 until date of payment;

be registered as a Judgment of the High Court in Malaya pursuant to the Reciprocal Enforcement of Judgments Act, 1958 **AND IT IS ORDERED** that the abovenamed Wong Teck Lim be at liberty to set aside the said registration within fourteen (14) days after service upon him of notice of such registration pursuant to rule 7 of Order 67 if he has grounds for doing so, and that execution upon the said Judgment will not issue until after the expiration of that period or any extension of the period granted by the Court; or if an application be made to set aside the registration until such application has been disposed of **AND IT IS LASTLY ORDERED** that the said Wong Teck Lim do pay the costs of this application.

Dated the 11th day of April, 1989.

Sgd
Senior Assistant Registrar
High Court, Kuala Lumpur.

The notice to the judgment debtor of the registration of the foreign judgment was issued on 14 April 1989 and addressed to the appellant. On 15 April 1991 the appellant took out a summons-in-chambers to set aside the order of the senior assistant registrar registering the Singapore judgment. This application was heard by the deputy registrar of the High Court who on 20 July 1994 dismissed the appellant's application. The appellant then appealed to the judge. On 14 April 1997 the learned judge dismissed the appellant's appeal. Hence the present appeal.

The reasons for applying to set aside the registration were stated in the affidavit affirmed by one Jeffrey Z.K. Wong dated 12 April 1991. In that affidavit he claimed to be the son of the appellant and was therefore authorised to affirm the affidavit on behalf of the appellant who was then away outstation. The relevant parts of the affidavit read as follows:

1. I am the son of the Defendant and am authorised to affirm this Affidavit on behalf of my father who is outstation at the moment. The facts deposed to herein are true to my personal knowledge save and except where the contrary is stated.

2. I am advised and duly belief that there was no due service of the Originating Process and my father was never served the Writ of Summons of the Court of Original Jurisdiction.

3. Further it has to be stated that there has not been voluntary submission to the Jurisdiction of the Court of Original Jurisdiction.

4. I am advised and verily belief that the registration was done contrary to the Reciprocal Enforcement of Judgments Act 1958, and further the Court of Original Jurisdiction has no Jurisdiction over the Defendant.

5. Further I am advised and verily belief that the enforcement of the Judgment that would be contrary with the Public Policy in Malaysia in that the Municipal Laws of Singapore are being enforced through these proceedings.

6. I would like to state that the Notice of Proceedings in Singapore was not received in time to give sufficient time to enable the Defendants to defend the proceedings and that the Defendant did not appear in the proceedings in Singapore.

7. Further the subject matter of the suit was a loan transaction calculated to defeat the operation of the provision of the Exchange Control Act of Malaysia and that procurement of the guarantee was not approved by the Controller of Foreign Exchange Malaysia.

The respondent in their affidavit in reply stated:

3. With respect to paragraph 1 thereof, the deponent has failed to exhibit a Power of Attorney or any other instrument authorising him to affirm this affidavit and is put to strict proof thereof. As such I am advised that the affidavit should not be read in support of this application.

4. As for paragraph 2 of the said affidavit, the Deponent has failed to inform the Court as to the source of his advice and belief that the judgment debtor was not served with the Writ of Summons. Notwithstanding the above, I crave leave to refer to the affidavit of service of Foo Soon Kee Jimmy which endorses the fact of service in accordance with the law. Now produced and shown to me marked "A-3" is the aforesaid affidavit.

5. With respect to paragraphs 3 to 6, the judgment creditor avers that:

   i) the Court of Original Jurisdiction in Singapore has jurisdiction over the judgment debtor by virtue of the guarantee of the judgment debtor to the judgment creditor. Now produced and shown to me marked "A-4" is a copy of the said guarantee.

   ii) that the purpose of the Reciprocal Enforcement of Judgments Act is to enable foreign judgments of reciprocating countries to register their judgments in Malaysia to facilitate enforcement. The contention of contravention of public policy is baseless.

6. As for paragraph 7, I am advised by my solicitors, M/s Skrine & Co. and do verily believe that the execution of the guarantee does not amount to a contravention of the Exchange Control Act of Malaysia.

The learned judge in dismissing the appeal found that the court of the original jurisdiction, ie, the High Court of the Republic of Singapore had the jurisdiction on the appellant. The registration of its judgment in Singapore was in order and should not be set aside.

Before us, learned counsel for the appellant submitted that the application to set aside the registration of the judgment is made under s. 5(2)(a)(i) of the Reciprocal Enforcement of Judgments Act 1958. Sections 5(1) and (2) provide:

5. Cases in which registered judgments must, or may, be set aside

(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment:

(a) shall be set aside if the registering court is satisfied -

(i) that the judgment is not a judgment to which this Part applies or was registered in contravention of this Act;

(ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case;

(iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;

(iv) that the judgment was obtained by fraud;

(v) that the enforcement of the judgment would be contrary to public policy in Malaysia; or

(vi) that the rights under the judgment are not vested in the person by whom the application for registration was made; and

(b) may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

(2) For the purposes of this section the courts of the country of the original court shall, subject to subsection (3), be deemed to have had jurisdiction –

(a) in the case of a judgment given in an action *in personam* –

(i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise that for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of that court;

(ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court;

(iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings to submit to the jurisdiction of that court or of the courts of the country of that court;

(iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or

(v) if the judgment debtor, being a defendant in the original court, had an office of place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place;

(b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action *in rem* of which the subject matter was movable property, if the property in question was at the time of the proceedings in the original court situated in the country of that court; and

(c) In the case of a judgment given in an action other than any such action as is mentioned in paragraph (a) or (b), if the jurisdiction of the original court is recognised by the law of Malaysia.

Subsection (3) is not relevant for the purposes of the present appeal. Learned counsel for the appellant contended that the appellant is entitled to set aside the registration under s. 5(1)(a)(iii) and s. 5(2)(a)(i). It was submitted that the appellant was not served with the writ of summons by the High Court of the Republic of Singapore. This was duly stated in para. 2 of the affidavit of Jeffrey Z.K. Wong and the respondent did not reply to this.

(A) Evidence In Affidavit

Before dealing with this, the respondent did raise the issue that the affidavit was not an affidavit affirmed by the appellant. The affidavit purportedly affirmed by the son of the appellant but there was no evidence to show that the deponent was actually the son of the appellant. Secondly, there was no specific authorisation by the appellant such as power of attorney even though the deponent was his son. In our view there is nothing wrong for a person to file an affidavit as long as the statements contained in the affidavit are within his knowledge. It would be wrong if he swore an affidavit in respect of anything within the personal knowledge of another person unless he revealed how the fact came to his knowledge. As such in our view the statement in para. 2 of the affidavit in support could not be accepted because it was based

on his belief only. He did not reveal how he came to his knowledge of this fact. As such this evidence could not be accepted and there is no necessity for the respondent to reply.

Notwithstanding the above the respondent through the affidavit of Low Eng Loo had replied to this as found in para. 4. In that it was revealed that personal service could not be effected on the appellant and for that reason the respondent applied for substituted service by way of advertisement in the Malaysian newspaper which was The New Straits Times. This was duly done on 20 July 1988. This can be seen from the affidavit of Foo Soon Kee and the exhibits attached thereon. It is clear to us that the appellant was duly served with the concurrent writ of summons by way of substituted service.

(B) Non Submission Of Jurisdiction

In the present appeal it was not disputed by the appellant that the cause of action arose from a guarantee dated 13 November 1985 whereby the appellant was one of the guarantors guaranteeing the repayment of a loan of RM4 million given to the first defendant, Phelim Investments Pte Ltd, a company incorporated in Singapore. Clause 20 of the said guarantee provides as follows:

> 20. The laws of Singapore Law Society's Conditions of Sale, 1981 apply in the construction of this Agreement.

In our view by executing the said guarantee where cl. 20 had been clearly stated it is clear to us that at that time the appellant had submitted to the jurisdiction of the original court. That guarantee being a continuing guarantee the submission to jurisdiction continues. In *Blohn v. Desser* [1961] 3 All ER 1 the defendant was a partner with her brother and sister in a family business carried on in Vienna in which she was registered as a partner in the commercial register in Vienna. She resided in England and did not participate in the conduct or the profits of the business in Vienna. An Austrian court gave judgment in favour of the plaintiff against the partnership in respect of a bills of exchange that the brother had accepted in the name and on behalf of the partnership. The brother at all times was a resident in Vienna and was the sole managing partner in the firm. Under Austrian law a partnership was not a separate legal entity and a successful action against a partnership firm did not impose personal liability on any individual partner. To execute a judgment against the personal assets of any partner, a further action had to be brought against that partner himself. In such an action, the partner was estopped by the doctrine of *res judicata* from raising defences which could have been raised by the firm in the original action but was entitled to raise defences personal to himself or arising from matters subsequent to the judgment against the firm. In an action by the plaintiff in the English courts based on the Austrian judgment, it was held that the court of a foreign country had jurisdiction to

entertain an action *in personam* against a debtor who did not reside physically in the country, but who, at the time of the action, was carrying on business through an agent resident in the country, where the transaction was effected by the agent at his place of business; the Austrian court had, therefore, jurisdiction to entertain the action against the defendant on the bill of exchange, the jurisdiction resting on implied agreement of the defendant by conduct to submit to the jurisdiction of the Austrian court in respect of the transaction. Diplock J (as he then was) at p. 4 said:

> In *Emanuel v. Symon (2)* Buckley, LJ, enumerated the five cases in which an English court would enforce a foreign judgment. His enumeration was as follows:
>
> > (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.
>
> There may be some doubt whether today it would be held that the jurisdiction exists in the first category of cases, but the other four cases have never been questioned. It is also, I think, clear law that the contract referred to in the fifth case, to submit to the forum in which the judgment was obtained, may be express or implied.
>
> It seems to me, where a person becomes a partner in a foreign firm with a place of business within the jurisdiction of a foreign court, and appoints an agent resident in that jurisdiction to conduct business on behalf of the partnership at that place of business, and causes or permits, as in the present case, these matters to be notified to persons dealing with that firm by registration in a public register, he does impliedly agree with all persons to whom such a notification is made – that is to say, the public – to submit to the jurisdiction of the court of the country in which the business is carried on in respect of transactions conducted at the place of business by that agent.
>
> While I do not accept that comity is the basis on which English courts recognise and enforce foreign judgments, for there are many instances in which English courts exercise jurisdiction *in personam* over non-resident foreigners, where they do not recognise a similar jurisdiction in a foreign court, it is to be observed that the English courts under R.S.C., Ord. 48A, r.1, do purport to exercise jurisdiction over non-resident foreign partners of partnership firms carrying on business at a place of business in England. I hold, therefore, in the absence of any binding authority on me, that the Commercial Court of Vienna had jurisdiction to entertain an action against the first defendant on the bill of exchange.

As such in our view the appellant when he signed the guarantee with the full knowledge of cl. 20 he had submitted to the jurisdiction of the High Court of the Republic of Singapore.

The learned counsel for the appellant cited *United Overseas Bank Ltd. v. Tjong Tjui Njuk* [1987] 2 MLJ 295 to support his contention that since the appellant did not submit voluntarily to the jurisdiction of the High Court of the Republic of Singapore, that court had no jurisdiction over him. In that case the judgment debtor sought an order to set aside the registration of a judgment obtained in the Supreme Court of Hong Kong and registered as a judgment in the High Court of Singapore. The judgment debtor and three others were ordered to pay the sum of HK$99,350.58. Service of the writ of summons was effected by inserting a true copy of the writ of summons enclosed in a sealed envelope duly addressed to the judgment debtor at her address in Hong Kong and inserting the sealed envelope through the letter box of the judgment debtor on 19 November 1985. The judgment debtor, a Singapore citizen and resident in Singapore claimed that she had left Singapore to stay in Brunei. She said she had no knowledge of the proceedings taken against her in Hong Kong and in Singapore and only found out about them sometime on 4 December 1986 when she returned to Singapore for a holiday. In his judgment, Chua J at p. 298 said:

> Was the Debtor duly served with the process of the original court? I find that she was not. The Creditor has in fact not complied with the Rules of the Supreme Court of Hong Kong. Before the Creditor can serve the writ on the Debtor in the manner provided for by Order 10 Rule 1(2)(b), the Debtor must be within the jurisdiction of the original court. The evidence clearly is that the Debtor was not within the jurisdiction of the original court at the time of the writ was purported to be served on the Debtor under Order 10 Rule 1(2)(b). The service is therefore bad.

It is clear to us that when the learned judge in that case allowed the debtor's application to set aside the registration he was influenced by the non-service of the writ on the judgment debtor.

That is not the case in the present appeal. As we have stated above it is clear to us that the service of the writ of summons on the appellant was properly done within the scope provided by the law. The substituted service was good and effective.

The next issue raised was whether submission to jurisdiction must be expressed or implied. This issue had not been conclusively decided. In *United Overseas Bank Ltd. v. Tjong Tjui Njuk* submission must be expressed. On the other hand, *Blohn v. Desser* decided that submission could be implied. Whatever it is, in the present appeal it is clear to us, by virtue of cl. 20 of the guarantee, that the appellant had expressly submitted to the jurisdiction of the original court.

That being the case, we are of the view that there is no merit in the contention of the appellant that he had not submitted to the jurisdiction of the High Court of the Republic of Singapore.

(C) Whether The High Court Of The Republic Of Singapore Had Jurisdiction On The Appellant In View Of Section 16(1)(b) Of The Supreme Court Of Judicature Act 1969 (Singapore)

Prior to 1993 s. 16(1)(b) of the Supreme Court of Judicature Act 1969 (hereinafter referred to as "the Singapore Act") is somewhat similar to s. 23(1)(b) of the Courts of Judicature Act 1964 (hereinafter referred to as "the Malaysian Act". Section 16(1) of the Singapore Act provides:

> 16(1) The High Court shall have jurisdiction to try all proceedings where -
>
> (a) The cause of action arose in Singapore;
>
> (b) The defendant or one of several defendants resides or has his place of business or his property in Singapore;
>
> (c) The facts on which the proceedings are based exists or are alleged to have occurred in Singapore; or
>
> (d) Any land the ownership of which is disputed is situated in Singapore.

Now, s. 23(1) of the Malaysia Act provides:

> 23. Civil jurisdiction – general
>
> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where –
>
> (a) the cause of action arose;
>
> (b) the defendant or one of several defendants resides or has his place of business;
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated;
>
> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

After the present action had been instituted, s. 16 of the Singapore Act was amended. This took place sometime in 1993. The new s. 16(1) of the Singapore Act provides:

16. Civil jurisdiction – general

(1) The High Court shall have jurisdiction to hear and try any action *personam* where –

(a) the defendant is served with a writ or other originating process –

(i) in Singapore in the manner prescribed by Rules of Court; or

(ii) outside Singapore in the circumstances authorised by and in the manner prescribed by Rules of Court; or

(b) the defendant submits to the jurisdiction of the High Court.

Since the amendment took place after the present action had been instituted, the amendment would not affect the present appeal. The former s. 16(1)(b) of the Singapore Act applies to the present appeal.

In the present appeal the appellant was one of the three defendants in the writ in the original court. As I have stated earlier the first defendant was Phelim Investments Pte. Ltd., a company incorporated in Singapore. That being the case, the plaintiff had every right to sue the first defendant. The first defendant was sued for a loan given to it by the plaintiff which is the respondent in the present appeal. The third defendant in that suit was the appellant and he was sued in his capacity as the guarantor of the said loan. It is clear to us both of them ware sued arising from the same transaction. In our view, the respondent in the present appeal by virtue of s. 16(1)(b) of the Singapore Act when it sued the first defendant on the loan, is also entitled to include and sue the appellant as one of the defendants because he was a guarantor to the loan upon which the action commenced. In *United Malayan Banking Corporation Berhad v. Soo Lean Tooi & Ors* [1984] 1 MLJ 47, the plaintiffs on 8 July 1977 obtained a judgment from the High Court of Singapore whereby it was adjudged, *inter alia*, that the plaintiffs do recover against the second defendant (the respondent in that proceedings) and two others, the sum of $20,645.22 with interest. The plaintiffs then applied under s. 4 of the Reciprocal Enforcement of Judgments Act 1958 to have the judgment against the respondent registered in Johor Bahru but only in respect of $11,460.38 with interest. On registration thereof being granted, the respondent applied to set aside the said registration. Yusof Abdul Rashid J dismissed the application to set aside where at p. 48 he said:

In my opinion it is the intention of the Legislature to confer jurisdiction in the High Court of Malaysia under section 23(1)(b) of Act 91 on a person who does not reside or has no place of business or has no property within the local jurisdiction of the said High Court if such person is one of several defendants who have sued where the other defendants are residing or have a place of

> business or have property within the local jurisdiction of the said High Court. Section 23(1)(b) of Act 91 would not have been worded so, had the intention of the Legislature been different. Should the words "one of several defendants" been omitted, then the High Court would not have jurisdiction on a person who is one of several defendants and who does not reside within the local jurisdiction thereof even if the other defendants are residing therein. Since the provisions of section 23(1)(b) of Act 91 are in *pari materia* with the provisions of section 16(1)(b) of the Singapore Act, the latter provisions should admit the same construction.

This decision was cited with approval by the former Supreme Court of Malaysia in *Malayan Banking Berhad v. International Tin Council and Another Appeal* [1989] 2 CLJ 961. At p. 965 Mohamed Azmi, SCJ, delivering the judgment of the court, said:

> In our view, service is not solely the foundation of jurisdiction of our High Courts. Apart from O. 11 r. 1, s. 23(1)(b) of the Courts of Judicature Act 1964 provides extra-territorial jurisdiction to the High Court in cases where foreigners overseas are sued as co-defendants with local residents. Our attention has been drawn to the case of *United Malayan Banking Corporation Bhd. v. Soo Lean Tooi & Ors* where the late Yusuf Abdul Rashid had expressed the following opinion on s. 23(1)(b).

His Lordship Mohamed Azmi, SCJ then cited the passage I have cited earlier. His Lordship went on to express the following:

> In interpreting s. 23(1)(b) of the Courts of Judicature Act, we must in general assume that the legislature knows the then existing state of the law on the jurisdiction of the High Courts under the Courts Ordinance 1948, and in construing an Act of Parliament where the words used by the legislature are precise and unambiguous, then the literal and strict construction rules should apply. There can be no doubt here that Parliament intends to confer on the High Court extra-territorial jurisdiction in cases where more than one defendants are being sued, so long as one of the several defendants resides or has his place of business within Malaysia. As stated by Lord Halsbury LC in the Solomon case at p. 29, the court has no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the Act itself. The provision of s. 23(1)(b) does not impose any condition relating to cause of action or the nature of the prayers being sought before the High Court can assume jurisdiction. ...

In *Bank of New Zealand v. Wong Kee Tat* [1990] 1 CLJ 1130, the court dismissed an application by the defendant to set aside the registration of a Singapore judgment. Eusoff Chin J (the Chief Justice of the Federal Court, then) at p. 1132 said:

I find that the defendant had been properly served with the notice of the concurrent writ on 6 May 1988. If he had wanted to enter appearance within 21 days of the date of that service, the last day would have been 27 May 1988. The defendant did not avail himself of this opportunity to enter an appearance and file his defence against the claim. His reason is that the original court had no jurisdiction over him. The question of jurisdiction had been dealt with in a similar case by Yusof Abdul Rashid J in *UMBC Bhd. v. Soo Lean Tooi & Ors*. There, the learned judge held that s. 16(1) of the Supreme Court of Judicature Act 1969 [Sing] conferred jurisdiction on the High Court of Singapore to try all civil proceedings where one of several defendants resided or had his place of business in Singapore. In Malaysia, s. 23(1)(b) of the Courts of Judicature Act 1964 has similar provision as that of the Singapore law. In *Malayan Banking Bhd. v. International Tin Council*, the Supreme Court decided that the High Court in Malaysia has jurisdiction to try civil proceedings where one of several defendants resides in this country, and the High Court may give leave to issue and serve out of jurisdiction, a notice of concurrent writ of summons on a co-defendant residing in London. Further, the Supreme Court held that service is not the sole foundation of jurisdiction of our High Courts.

Further down his Lordship said:

In *Pemberton v. Hughes*, the plaintiff claimed her share of property from the estate of her deceased husband. The other beneficiary alleged that the plaintiff was not legally divorced by her former husband before she married the deceased because the writ of subpoena for the divorce proceedings issued by the Florida court did not comply with the rules of the Florida court. The rules there provided that the time for appearance must not be less than ten clear days from the date of the issue of the writ. The writ only gave nine clear days. Because of this irregularity, it was argued that the whole of the subsequent proceedings was rendered null and void, and therefore the decree for divorce was of no effect whatever. Consequently the plaintiff could not marry the deceased. The High Court came to the conclusion that this defect went to the root of the jurisdiction of the Florida court and was fatal to the validity of the divorce. On appeal, the Court of Appeal held:

> Here it is alleged there was no proper service. The true principle seems to me to be that a judgment, whether *in personam* or *in rem*, of a superior court having jurisdiction over the person, must be treated as valid till set aside either by the court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid, as, for instance, a case where there had been not only no service of process, but no knowledge of it. The allegation of no service alone would not in such a case avail the defendant.

> As stated earlier, there is no doubt that the defendant was subject to the jurisdiction of the original court. He had been served with notice of concurrent writ to enter an appearance in the original court. He had been given an opportunity of having a hearing in the original court. He could have entered a conditional appearance and challenged the jurisdiction of the original court. But he had deliberately refused to exercise that opportunity.

This case is directly on point with the present appeal and the principle stated therein is applicable to the present appeal. In the present appeal, it is clear to us that the appellant was duly served with notice of concurrent writ.

As pointed out above, the appellant did not file any affidavit. It was his son who filed the affidavit. It is clear from that affidavit that the son based the non-service on his own belief and not from the knowledge of the father who was the one served. Further, from the affidavit it is apparent to us that he was a citizen and resident of the United States of America. That being the case, there was a good possibility that when the advertisement in the New Straits Times appeared in respect of the notice of concurrent writ he was not in Malaysia. In our view, the appellant must satisfy us by evidence that he did not see the advertisement and give good reasons why he did not see it. As stated by his Lordship Eusoff Chin, CJ in *Bank of New Zealand v. Wong Kee Tat (supra)*, the appellant lost his opportunity to challenge the judgment of the original court. In our view, there is no merit in the submission of the appellant to set aside the registration.

As can be seen from the authorities cited above, the question of voluntary submission to jurisdiction or not is not the issue in the present appeal. The issue is whether the appellant came within the jurisdiction of the original court or not. In our view, the appellant was within the jurisdiction of the original court. It is clear to us the appellant was one of the three defendants in the original court. It is also clear to us that the first defendant was within the jurisdiction of the original court because of the loan transaction, the appellant being the guarantor of the said loan and being named as the third defendant in a suit in respect of the said loan came within the jurisdiction of the original court by virtue of s. 16(1)(b) of the Singapore Act.

(D) Loan Transaction Was Invalid

The last ground to set aside the registration as stated in the affidavit was that the loan transaction was calculated to defeat the provision of the Exchange Control Act of Malaysia and that procurement of the guarantee was not approved by the Controller of Foreign Exchange Malaysia. It was submitted that the loan transaction and the guarantee were invalid for illegality. From my records, this point was not raised before us, but was raised in the court

below. Whatever it is, the answer to this issue is found in *Bank of New Zealand v. Wong Kee Tat (supra)*, where at p. 1133 the learned Chief Justice said:

> As regards the allegation that the borrowing had been transacted without the permission of the Controller of Foreign Exchange ('Controller') and therefore in contravention of s. 4 of the Exchange Control Act 1953 ('the Act') and consequently it was void for illegality, this issue had been dealt with by Shankar J in *Bumiputra Malaysia Finance Ltd. v. Datuk Syed Kechik and Ors* in Kuala Lumpur Civil Suit C23-1989-86. I agree with the views held by him that the borrowing does not make the act illegal by virtue of s. 36 of the Act. Further, the non-obtainment of permission of the Controller before the borrowing puts the borrower or lender to risk of being prosecuted and sentenced under para 7 Part II of the First Schedule to the Act.
>
> It was also held in *Contract and Trading Co. (Southern) Ltd v. Barbey & Ors* that the Exchange Control Act 1974 does not provide a moratorium for debtors but controls the immediate destination of the payments they make. Moneys due under judgments can be paid into court; thus discharging the debtor, and the fund itself remains out of the control of the creditor until consent had been obtained.

(E) Conclusion

For the reasons we have stated above, it is clear to us that there is no merit in the submissions and the issues raised by the appellant. We were even of the view that there was no necessity for the respondent to reply. That being the case, there is no basis to set aside the registration of the judgment. The appeal is hereby dismissed with costs. The deposit is to be paid to the respondent to account of taxed costs.